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AZ CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

RAYMOND R. PUGEL AND JULIE B.
PUGEL, husband and wife as trustees of THE
RAYMOND R. PUGEL and JULIE B. PUGEL
FAMILY TRUST,
and
ROBERT RANDALL and SALLY RANDALL,
husband and wife
Complainants,
v.
PINE WATER COMPANY, an Arizona
Corporation
Respondent.

DOCKET NO. W-03512A-06-0407

REPLY TO RESPONSE TO MOTION IN
LIMINE

ASSET TRUST MANAGEMENT, CORP.
Complainants,
v.
PINE WATER COMPANY, an Arizona
Corporation
Respondent.

DOCKET NO. W-03512A-06 -0613

JAMES HILL and SIOUX HILL, husband and
wife and as trustees of THE HILL FAMILY
TRUST,
Complainants,
v.
PINE WATER COMPANY, an Arizona
Corporation
Respondent.

DOCKET NO. W-03512A-07-0100

Arizona Corporation Commission
DOCKETED

JUN 22 2007

DOCKETED BY

1 **BRENT WEEKES,**
2 **Complainants,**
3 **v.**
4 **PINE WATER COMPANY, an Arizona**
5 **Corporation**
6 **Respondent.**

DOCKET NO. W-03512A-07-0019

7 COMES NOW RAYMOND R. PUGEL AND JULIE B. PUGEL, husband and wife as trustees of THE
8 RAYMOND R. PUGEL and JULIE B. PUGEL FAMILY TRUST, and ROBERT RANDALL and
9 SALLY RANDALL, husband and wife, ASSET TRUST MANAGEMENT, CORP. and BRENT
10 WEEKES, by and through their attorney undersigned and respectfully move the hearing officer to grant
11 the Motion in Limine precluding the introduction of evidence or issues beyond the scope of what should
12 lawfully be considered at the hearing on the Complainants' Application for the Deletion of Territory
13 from the Certificate of Convenience and Necessity {CC&N} of Pine Water Company.

14 The Complainants and Pine Water Company each have a different perspective as to the scope of
15 the hearing to be held by the Arizona Corporation Commission pertaining to the application for deletion
16 of territory from the CC&N of Pine Water Company. Pine Water Company, in an effort to preserve the
17 integrity of its CC&N, even though it is abundantly clear that it has problems providing adequate water
18 service to the residents and property owners within the Certificated Area,¹ seeks to introduce irrelevant
19 and immaterial evidence pertaining to issues beyond the scope of this hearing. The Complainants all
20 seek to have their property removed from the CC&N so that they can explore alternatives and provide
21 themselves water service since Pine Water Company will not and cannot provide them adequate service.

22 The Complainant's in their initial Motion point out the limitations set forth by the Supreme
23 Court of Arizona in the *James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz.
24 426, 671 P.2d 404 (S.Ct. 1983) case. The position of the Complainants is that the hearing is limited to
25 the determination of the issues of:

26
27
28 ¹ The Administrative Hearing Officer's attention is directed to a letter from Kris Mayes, a member of the Arizona Corporation
29 Commission to Robert Hardcastle, Pine Water Company, dated June 12, 2007, published in the *Payson Roundup* on June 15,
2007, page 9A, wherein Commissioner Mayes outlined the current dismal state of affairs and requested certain assurances
from Pine Water Company to prevent the problems of water outages and diminished service in the Pine area.

1 1. Can Pine Water Company provide adequate water service to the Complainants?

2 2. Can Pine Water Company provide this water service at reasonable rates?

3 As noted by our Supreme Court, Pine Water should be allowed the opportunity to provide the adequate
4 service at reasonable rates before a portion of its certificate is deleted. Clearly evidence to that end
5 should be a part of this proceeding, but the Supreme Court also noted that an application for deletion of
6 territory is not the same as an application for the initial grant of a Certificate of Convenience and
7 Necessity. In the case of an initial application the public interest is determined by:

8
9 comparing the capabilities and qualifications of competitors vying for the
10 exclusive right to provide the relevant service. The amounts of time and
11 money competitors must spend (at the consumers' ultimate expense) to
12 provide service become primary determinants of the public interest. *Id at*
13 **430**

14 But in the case of a deletion of territory the view of the public interest is different in that:

15
16 Where a public service corporation holds a certificate for a given area, the
17 public interest requires that that corporation be allowed to retain its
18 certificate until it is unable or unwilling to provide needed service at a
19 reasonable rate. *Id at 430.*

20 So it is abundantly clear that those are the questions which are the subject matter of this hearing, not the
21 issues of the capabilities and qualifications of competitors, or the time and money which must be spent,
22 or even whether or not the complainants have a means of providing water service for themselves.
23 Attempts to raise such issues merely are an attempt to focus the purpose of this hearing away from the
24 principal questions which must be resolved which will not be resolved in favor of Pine Water Company,
25 onto issues where the waters can be muddied and Pine Water Company can hope, like their prayer for
26 rain, that something will happen which will extricate them from this untenable situation in which they
27 find themselves.

28 Looking at the arguments posited by Pine Water Company clearly demonstrates this tactic on
29 their part. They argue:

- *Complainants have not identified specific evidence to be excluded and have asked for a broad sweeping exclusion.*

The first question is whether or not this is the time to isolate specific evidence. The hearing has not
begun and specific evidence has not been offered. Until such time as the evidence per se is offered, it is

1 not possible to make specific objection. The general statement by Pine Water Company on its face may
2 look good, but it lacks merit.

- 3 • *Complainants have not provided specific objections to specific evidence.*

4 The principal objection is that of relevancy. Matters which the Pine Water Company is threatening to
5 make a part of this hearing have been set forth and those to which this motion is directed are those which
6 are not relevant to the issues which the Arizona Supreme Court has directed the Commission may
7 review in considering an application for deletion of territory.

- 8 • *PWCo's due process rights would be violated if PWCo cannot defend against all charges set forth in the complaint.*

9 There is no argument that Pine Water Company should be allowed to defend against the charges that it
10 cannot provide the complainants reasonable service at a reasonable price. The Motion in Limine is
11 directed to the extraneous matters which the Pine Water Company appears to be interested in presenting
12 to this hearing.

- 13 • *Complainants have refused to pursue main extension agreements and to advance the water supply infrastructure and the water supply facilities*

14 This would be a legitimate matter for the hearing officer to consider in light of the legal requirement that
15 Pine Water Company has to be afforded the right to provide service before its CC&N can be terminated.

- 16 • *Complainants actions seek to carve up the CC&N.*

17 Number one, this is merely argumentative, not really directed at the issue of the relevancy of evidence.
18 Second, if Pine Water Company cannot provide adequate service at reasonable rates, then it is incumbent
19 upon the Commission to carve up Pine Water Company's CC&N.

- 20 • *Complainants seek to avoid regulatory oversight of the ACC by deleting their lands from the CC&N*

21 How is this relevant to the questions which the Commission is allowed to address in this instance?

22 While this may be a matter of statewide policy, the law is certainly established concerning which water
23 purveyors can be regulated by the Commission and which are not. This argument is meaningless.

- 24 • *Allowing the Complainants to be deleted allows them to draw down the aquifer without any regulation by the ACC making it impossible to manage the limited resources in the Pine Area.*

25 This argument of Pine Water Company is well beyond the scope of this hearing. Additionally, it appears
26 to involve subject matter outside the jurisdiction of the Commission such as matters pertaining to the
27 drawdown of groundwater. So this argument should be totally disregarded.
28
29

- *Complainants have previously asserted that the scope of discovery is broad and inclusive and are barred from changing their mind.*

Another argument which has no merit. The Complainants may have made such assertions in the negotiations concerning the scope of discovery, but they have not made such assertions in any formal pleadings before the Commission. Thus they are not barred from taking a contrary position.

- *Complainant's are requesting that the ACC not determine:*
 - a. whether the Milk Ranch well is an adequate and assured water source*
 - b. how future customers will be provided with service*
 - c. how the remaining customers of PWCo may be impacted by the requested deletion and groundwater pumping in the deleted territory*
 - d. whether it is good public policy to allow a private developer that refuses to follow AAC R14-2-406 to carve up a CC&N for commercial gain.*

It is beyond the Commissions jurisdiction to determine the adequacy and assured water source issues pertaining to the Milk Ranch Well. It is not necessary in the determination as to whether or not Pine Water Company can provide adequate service at a reasonable rate that the Commission make a determination as to how future customers on the Complainants' property will be provided water service. It is not within the jurisdiction of the Commission to determine the impact of water pumping on the property proposed to be deleted on other water resources and clearly it would be of benefit to the other customers of Pine Water Company to delete territory seeking water service so that the already limited resources of Pine Water Company can better serve the existing customers of Pine Water Company.

As for the public policy issue, that is clearly not within the scope of this hearing. While it may be a matter of general statewide importance, it cannot be determined within this limited context. Second, the characterization of the Complainants is poor. The issue of the following the rule, especially as it relates to property such as the Complainant ATM which has no water resource, becomes meaningless. As for the others, while the rule may have historically worked, its application in this instance would clearly violate the State Constitution prohibitions of taking private property for public use without paying compensation since it does constitute a taking of the right to extract and use groundwater and makes no provision of the payment therefore.

Last, what is the problem with the Complainant's making a profit? Pine Water Company hopes to make a profit each and every year. If one looks at the history of jurisprudence in this country, the right to own and control property and make a profit therefrom is as inviolate as the personal rights which

1 we strongly defend. The founding fathers were businessmen and land owners and they equated property
2 rights with personal or human rights, it is the right to "life, liberty and property" which is protected.
3 Pine Water Company is attempting to engage in a plunder of those property rights without
4 acknowledging their protected status!

- 5 • *Complainants are attempting to prevent the Commission from undertaking the necessary public
6 interest analysis.*

7 The Complainants are actually attempting to have the Commission undertake the necessary public
8 interest analysis as mandated by the Arizona Supreme Court in ***James P. Paul Water Company v.***
9 ***Arizona Corporation Commission, 137 Ariz. 426, 671 P.2d 404 (S.Ct. 1983).*** It is Pine Water
10 Company which is attempting to extend this analysis to include items which are not within the scope of
11 the power and the authority of the Commission in this instance.

- 12 • *Complainants seek to avoid regulation by the Commission.*

13 Is this even a relevant issue? The scope of the power and authority of the Commission is limited by the
14 Constitution and laws of the State of Arizona. The Complainants have the right to come under the
15 regulatory authority of the Commission, or to organize their activities so that they do not come under the
16 jurisdiction of the Commission. This is not a reason to not exclude the irrelevant and impertinent
17 information and arguments which Pine Water Company is attempting to make from these proceedings.
18 Clearly it is an attempt by Pine Water Company to goad the Commission into action in their favor, but
19 such action does not mean that it is a relevant argument.

- 20 • *Complainants are attempting an end run around Arizona's regulated monopoly scheme.*

21 Clearly this is an argumentative and incorrect prejudicial slant on the Complainants. The regulated
22 monopoly scheme as referenced by Pine Water Company is not a license to provide inadequate service
23 and be protected by the state. Rather, as the court stated in ***James P. Paul Water Company v. Arizona***
24 ***Corporation Commission, 137 Ariz. 426, 671 P.2d 404 (S.Ct. 1983),***

25 "[t]he monopoly is tolerated only because it is to be subject to vigilant and
26 continuous regulation by the Corporation Commission and is subject to
27 rescission, alteration or amendment at any time upon proper service when
28 the *public interest* would be served by such action." (Emphasis added.)

29 The Court in the ***James P. Paul, supra*** decision defined how that public interest should be ascertained
and it is by asking the two questions, is holder of the CC&N providing adequate service at reasonable

1 prices. A fairly simple scenario. No one is running around the regulated monopoly scheme, if anything
2 Pine Water is attempting to use it to show that they can continue to provide less than adequate service
3 and be protected.

- 4 • *If a domestic water improvement district is formed the commission would have no regulatory jurisdiction.*

5 And the problem with this is??? This is a true statement, but what is the argument? This is not relevant
6 nor material to the question of whether or not Pine is providing adequate service at a reasonable price to
7 the Complainants' property. Under the Constitution and laws of the State of Arizona public service
8 corporations providing water service are regulated by the Commission to protect the public.
9 Governments providing water service are not regulated by the Commission. Perhaps the Commission
10 should be grateful that if the Applications for Deletion of Territory of the Complainants are granted that
11 could create a situation where there is less of a burden on the Commission in light of the continuous
12 problems which Pine Water Company is having in the Pine area.

- 13 • *Pine argues that the only reason the Complainants cannot be served is the Commission imposed moratorium*

14 Pine argues that the only reason the complainants cannot be served is the Commission imposed
15 moratorium. But look at the logic, without that moratorium could Pine Water Company serve the
16 Complainants in an adequate manner. A quick look at the letter earlier referenced from Kris Mayes to
17 Pine Water Company shows that Pine is not able to adequately serve the property presently being served
18 in the CC&N, so how could it serve more. This is another example of why the scope of the hearing must
19 be limited to those issues properly before the Commission, can Pine Water Company adequately serve
20 the Complainant's property at a reasonable price?

21 **CONCLUSION**

22 Pine Water Company has thrown a lot of arguments at the Commission hoping something would
23 stick. But the reality is that the Response of Pine Water Company shows just why the Motion in Limine
24 of the Complainants should be granted. Left unchecked, Pine Water Company will try to do a cross
25 between Richard Gere's "Razzle Dazzle" in the movie Chicago and Mohammed Ali's old "rope a dope"
26 as he practiced in the boxing ring. Distract the trier of fact from the realities of the situation and hope
27 that you can convince them on some immaterial, irrelevant, or collateral issue that you deserve to win.
28
29

Instead the Complainants urge that everyone keep the focus on the central issues of this case and decide those issues on their respective merits. For this reason the Complainants' Motion in Limine should be decided in a favorable manner to the Complainants and Pine Water Company should be precluded from introducing evidence or testimony which is beyond the scope of the issues to be decided as set forth by the Arizona Court in *James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d 404 (S.Ct. 1983),

Respectfully submitted this 20th day of June, 2007.

~~Gliese Law Offices, P.L.L.C.~~

John G. Gliche

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2 This 20th day of June, 2007 to:

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